

Hon. Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
Plaintiff,

v.

JOHN YIN,  
Defendant.

NO. CR16-314RAJ

GOVERNMENT'S SENTENCING  
RECOMMENDATION

DATE: April 14, 2017

Comes now the United States of America, by and through Annette Hayes, United States Attorney for the Western District of Washington, and Susan M. Roe, Assistant United States Attorney for said District, and files this pleading to assist the Court at sentencing. The government has no objections to the facts and calculations contained in the PreSentence Report facts and, at this time, understands that the only disputed guideline issue is the application of the specific offense characteristic increase for sophisticated means.

1 ***Introduction***

2       On December 2, 2016, Mr. Yin entered guilty pleas to a two count Information  
3 containing charges of one count of Wire Fraud and one count of Conspiracy to Defraud  
4 the Government. The two counts address the systemic and sophisticated fraud Mr. Yin,  
5 his employer, and his customer restaurants engaged in to cheat state, local and federal  
6 taxing authorities.

7 ***Conduct Underlying the Guilty Plea***

8       For nearly a decade, JOHN YIN has been the sole source of Profitek (POS) system  
9 in Washington State which he marketed, sold and serviced to retail and restaurants  
10 Profitek Software is owned by InfoSpec, Inc., a company based in Vancouver, British  
11 Columbia, Canada. The corporate website lists the following information: Profitek is a  
12 leading software development company specializing in Point-of-Sale (POS) solutions for  
13 the hospitality and retail industries. The company is based in Canada, has two offices in  
14 China, and a growing dealership network across North America. Profitek claims to be  
15 the first POS solution in North America to provide dual language operation and, in this  
16 investigation, the software used English and Chinese languages.<sup>1</sup>

17       Businesses use Point of Sale (POS) computer systems to keep track of dates and  
18 times, customers, servers, tables, orders, payments and refunds. All transactions are  
19 recorded in a database maintained by the POS software in real-time.

20       State, Local and Federal taxing authorities allow businesses the option of  
21 predicating their tax burden on calculations derived from the electronic database  
22 maintained by the POS system. As with any business record, the electronic sales data  
23 must be complete, accurate, and must be furnished to the agencies on request in case of  
24 audit.

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28 <sup>1</sup> Concerningly, Mr. Yin continues to be employed by Profitek, selling the same POS software to restaurants.

1        *Background and History of Profitek and RSS in Canada*

2        From 2000 to 2008, InfoSpec Systems Inc., which created and marketed the  
 3        Profitek POS software, was investigated by the Canadian Revenue Agency for creating  
 4        and marketing an accompanying software – its own Revenue Suppression Software (RSS  
 5        or “zapper”). Its RSS was available to Profitek clients so they could delete cash  
 6        transactions from the system, thereby under-reporting revenue and income for tax  
 7        purposes. Pius Chan, president of InfoSpec, and others, were criminally charged and  
 8        prosecuted.

9        According to Canadian court documents and news articles, Pius Chan and  
 10       InfoSpec sold zappers to restaurants knowing the programs would be used to facilitate tax  
 11       evasion. InfoSpec initially was charged with fraud, four counts of evading income tax,  
 12       and four counts of evading the Canadian Revenue Agency but was convicted only of the  
 13       fraud count. In the proceedings, the court found that Pius Chan was the “directing mind  
 14       of the corporation” and that he “intended to defraud the public by providing or  
 15       distributing a zapper program that allowed customers to suppress income and thereby  
 16       evade tax.” In 2013, Mr. Chan’s conviction was overturned on the narrow holding that  
 17       the *sale* of the software was not illegal. In the opinion, the court wrote:

18       I do not accept the Crown’s submission that InfoSpec ‘engaged in a course of  
 19       dealings that was by its very nature dishonest.’ InfoSpec participated in  
 20       commercial transactions involving the sale of a computer program that is not  
 21       prohibited by law; the restaurants got what they paid for. Whatever reasonable  
 22       people might think about the propriety of such a sale, I am unable to say they  
 23       would consider the vendor to have acted dishonestly.

24       *Regina v. InfoSpec Systems, Inc.* 2013 BCCA 333, Docket Number CA040174,  
 25       date: 2013-07-17. The court opined that if Parliament considered a prohibition on  
 26       zappers was necessary to thwart tax evasion, it should pass such a law. It did. In 2014,  
 27       the Canadian Government enacted federal laws that businesses or individuals caught  
 28

1 using, developing, or selling RSS face a fine of between \$5,000 to \$1,000,000 and a  
2 prison sentence of up to five years.

3 It is noteworthy that the Canadian most similarly situated to Mr. Yin, that is,  
4 David Au, the Canadian authorized dealer of Profitek who sold the POS and RSS, was  
5 convicted of fraud. His criminal conviction was not aside; neither were the sanctions for  
6 the restaurants prosecuted for using the RSS.

7 Following the enactment of the 2014 law, InfoSpec moved its RSS software  
8 operation offshore -- from Canada to China. Mr. Yin associated with Pius Chan during  
9 this entire time, worked for InfoSpec during the criminal proceedings, knew about the  
10 Canadian criminal convictions and, most importantly, continued doing business with  
11 InfoSpec as it moved its illegal RSS operation to China in spite of the illegality of the  
12 business. Moreover, there is some evidence of a personal relationship between Mr. Yin  
13 and Mr. Chan. For instance, Mr. Yin's 2010 bank records reflect four checks, totaling  
14 \$3,900.00, written by Mr. Yin to Mr. Chan which were deposited into Mr. Chin's  
15 personal, not business, bank account.

16 Also in 2013, the State of Washington enacted Senate Bill 5715, codified at RCW  
17 82.32.290, which prohibited the mere possession as well as the use of automated sales  
18 suppression software (RSS or zappers).

19  
20 *This Investigation and John Yin's Role in the Fraudulent Scheme*

21 During routine business audits performed by the Washington State Department of  
22 Revenue (DOR) in the past few years, auditors noted several restaurants and a few other  
23 businesses that both used the Profitek POS system and reported unusually low cash sales.  
24 Auditors visited the restaurants anonymously, paid cash for their meals, and later  
25 reviewed the business' proffered purportedly true and complete sales records for  
26 accuracy. Several of the suspected establishments had deleted records relating to the  
27 auditors' cash transactions. These businesses bought their POS and revenue suppression  
28 software through John Yin and even consulted with Mr. Yin, as needed, during their

audits. Government officials learned the identity and active role of John Yin from his customers, in particular, from the owner (YL) of a successful Eastside restaurant (See Plea Agreement, paragraph 8, page 6, line 20 *et seq.*).

During that audit, YL provided initial records and reports to DOR, encountered difficulty in accessing additional records, then called Mr. Yin to help print out the reports that DOR staff had requested. Mr. Yin came to the restaurant for a day and, with DOR staff present, attempted to generate reports from the Profitek system. Mr. Yin claimed he was unable to generate the reports while in the restaurant and he told the DOR personnel that he would log into the restaurant's POS system remotely and email the reports. The next day, Mr. Yin emailed false reports to DOR.

Only when DOR personnel advised YL that the submitted records were untrustworthy, did she admit the longtime use of the Profitek RSS. YL demonstrated the RSS to DOR and acknowledged cheating on taxes for years 2010 through 2013. The total amount of unpaid state and federal taxes for the four years has been assessed at \$910,324.50.

As part of the investigation, an Internal Revenue Service Special Agent, posing as a POS and RSS customer, spoke and met with Mr. Yin. Mr. Yin expressed reluctance to discuss the zapper over the phone, but said it came from China, and that he communicated with the RSS developer in China only through email. Mr. Yin further explained that the Chinese developer would provide the customer with bank account information, the customer would wire funds into the account, and the developer would email the software to the customer.. He told the agent that the cost was approximately \$700 and once payment was secured, the agent would receive the "cash management" software (zapper) by email. Mr. Yin also said the RRS software was very sensitive and neither he nor Profitek would touch it but he offered to show the agent how to use the zapper and the two agreed to meet at a restaurant using it.

Several days later, they met for nearly two hours at a customer restaurant using the Profitek POS and RSS. Mr. Yin showed the POS system to the agent and the two

1 discussed the RSS in detail. Mr. Yin reiterated that he sold the Profitek POS, denied  
2 selling the RSS directly, and reviewed how to order it. Mr. Yin explained the zapper and  
3 its instructions included directions on activating the RSS. Mr. Yin explained that each  
4 application was tied to a specific telephone landline that could not be transferred to  
5 another line. Mr. Yin vouched for the RSS dealer's reliability and said that every one of  
6 his clients who transferred money received a working version of the RSS.

7 Mr. Yin told the agent that he serviced the RSS for his clients, that he accessed  
8 their accounts remotely from his home computer, that he had facilitated the sale of RSS  
9 for 15 years, and said the customer restaurant had been using RSS for the past eight years  
10 or so.<sup>2</sup>

11 In a subsequent meeting, Mr. Yin delivered a copy of the POS system along with  
12 the email address in China. He advised that, although delivery of the zapper usually  
13 occurred within two weeks, his customers recently had complained of delays.

14 This investigation continued with a search of Mr. Yin's emails which confirmed  
15 that he directed his customers to the Chinese zapper developer, that he shepherded them  
16 through the purchase process, and that he assisted them when they needed help with the  
17 program.

18 Searches, including of his home office, yielded a list of dozens of his restaurant  
19 customers, many of which bought and used the zapper program.

20 It is apparent that, in addition to the POS systems, Mr. Yin facilitated the sale of  
21 the Profitek zappers to customers which were successful in promulgating false and  
22 fraudulent business financial records, to hide cash sales and to underpay taxes.

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28 <sup>2</sup> This restaurant is not one of the nine included in the Plea Agreement.  
GOVERNMENT'S SENTENCING  
RECOMMENDATION/YIN  
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1        *Sentencing Considerations*

2        *Sentencing Guidelines Calculations*

3        The following guideline references may assist the Court at sentencing. As set  
4 forth within the Plea Agreement (See, Paragraph 11) the parties agrees that:

- 5        - Mr. Yin's two counts of conviction group (USSG § 3D1.2);
- 6        - His base offense level is seven (7) (USSG § 2B1.1(a)(1);
- 7        - The level is increased sixteen (16) levels based on the agreed loss amount
- 8        (USSG § 2B1.1(b)(1)(I)); and
- 9        - Mr. Yin is entitled to the three (3) level Acceptance of Responsibility
- 10       reduction (USSG § 3E1.1(a) and (b)).

11       The parties reserved the right to argue the applicability of other guidelines.

12  
13       The government and the United States Probation Officer urges the applicability of  
14 a two (2) level increase for sophisticated means pursuant to United States Sentencing  
15 Guidelines Section 2.B1.1(b)(10).

16       Application Note 9(B) in the USSG Commentary addresses the Sophisticated  
17 Means Enhancement:

18           For purposes of subsection (b)(10)(C), "sophisticated means" means especially  
19           complex or especially intricate offense conduct pertaining to the execution or  
20           concealment of an offense. For example, in a telemarketing scheme, locating  
21           the main office of the scheme in one jurisdiction but locating soliciting  
22           operations in another jurisdiction ordinarily indicates sophisticated means.  
23           Conduct such as hiding assets or transactions, or both, through the use of  
24           fictitious entities, corporate shells, or offshore financial accounts also  
25           ordinarily indicates sophisticated means.

26       Mr. Yin was the purveyor and servicer of a complex computer program designed  
27 to efficiently delete business records and automatically produce a complete set of false  
28 business record. The false business records promulgated gave no hint of being anything  
other than true and accurate. Mr. Yin's zipper computer program was designed and

1 used solely for the purpose of cheating on taxes by producing the corrupt records. Those  
2 records appeared perfectly authentic to city, county and federal governments. The corrupt  
3 records produced by Mr. Yin's product were so professional and complete that the use of  
4 the zapper was first confirmable only when a customer admitted its use. The zapper  
5 program sold and serviced by Mr. Yin has been successfully used surreptitiously for  
6 several years.

7 Mr. Yin's zapper product was activated only when used on a specific, uniquely  
8 identified computer. That very narrow activation rendered the zapper program and any  
9 copies useless elsewhere - which was a highly effective way of thwarting detection. For  
10 instance, law enforcement received a thumb drive with the zapper program, however, it  
11 was unworkable once removed from the specific computer and its dedicated landline.

12 As Mr. Yin well knew, his employer and an authorized sales representative were  
13 prosecuted in Canada for use and sale of the zapper software. Mr. Yin worked with the  
14 company throughout that time. One response to the Canadian prosecution was that the  
15 company moved the zapper software production out of Canada and relocated it to China.  
16 Mr. Yin followed the source of the program to its new location in China; he himself  
17 employed the new email address which used a Chinese server, and he provided the new  
18 email address to his customers. A Chinese email account is nearly untouchable by law  
19 enforcement and its records are unobtainable by the United States or Canada. As a result,  
20 most of the electronic communications regarding purchase and payment are concealed  
21 overseas. The move to China was undertaken to defeat law enforcement involvement and  
22 to continue peddling the fraudulent schemes in the United States and Canada.

23 Based on the above, the two level enhancement for sophisticated means is  
24 appropriate in this case. "Conduct need not involve highly complex schemes or exhibit  
25 exceptional brilliance to justify a sophisticated means enhancement," *United States v.*  
26 *Jennings*, 711 F.3d 1144, 1145 (9th Cir.2013), although this computer program itself was  
27 quite complex and the roundabout way of ordering and paying for it was sophisticated.  
28 Courts cited the "high level of planning and concealment of a defendant's theft," *United*



1 *States v. Tanke*, 743 F. 3d 1296 (9th Cir. 2014), and the “complicated and fabricated  
 2 paper trail [which] made discovery of his fraud difficult.” *United States v. Horob*, 735  
 3 F.3d 866, 872 (9th Cir. 2013) when affirming this application.

4 The high level of effort Mr. Yin and his conspirators expended to conceal their  
 5 and their clients’ fraud, the efficacy of the zapper program itself, and the complicated  
 6 electronic trail all point to this fraud being committed and hidden in a sophisticated  
 7 manner.

8  
 9 *Restitution*

10 Mr. Yin agrees with the computation of taxes owed by his customer restaurants to  
 11 Washington State and the U.S. Government. (See, Plea Agreement, Paragraph 7). Those  
 12 restaurants are the nine establishments included in the Statement of Facts and were  
 13 chosen because DOR had completed these audits before the entry of Mr. Yin’s guilty  
 14 plea.<sup>3</sup> The \$3,445,589.00 is the total only of the Washington State sales tax and the  
 15 federal income tax due from the skimmed cash receipts. Other possible unpaid taxes,  
 16 such as social security and Medicare, are not included in this calculation.

17 Mr. Yin likely did not reap the obvious benefits of the zapper scheme, that is, he  
 18 probably did not receive [unreported] cash from the restaurants. Rather, his benefit was  
 19 that he kept his job as the sole authorized representative of Profitek in this state, thereby  
 20 making the best living of his life.

21 As part of Mr. Yin’s Plea Agreement, and in recognition that he personally did not  
 22 become enriched by the fraudulent scheme, the government drafted the Plea Agreement  
 23 to make the restitution an imperfect “joint and several” obligation with his customer  
 24 restaurants. By adding the language “with credit for any amounts already paid” (See Plea  
 25 Agreement, page 4, line 23), the government agrees that the amounts paid by the  
 26 restaurants to Washington State DOR and the Department of Treasury, arising out of the  
 27

28 <sup>3</sup> Although the audits are complete, not all of the restaurants are aware of the audit results.

audits and pursuant to administrative, civil or criminal proceedings thereof, should be credited to Mr. Yin's restitution obligation. We anticipate that the individual restaurants will not be criminally prosecuted federally. Local criminal prosecution as well as civil or administrative tax cases may result.

While the burden will be on Mr. Yin and his counsel to ensure he receives credit for those payments, the government has recommended specific avenues for tracking the payments and has offered some assistance in insuring his ability to obtain the information.

#### *Consideration of Title 18, USC, Section 3553 Factors*

The Court should "impose a sentence sufficient, but not greater than necessary, to comply with" the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. A sentencing court is then directed to take into account "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as "the need for the sentence imposed" to serve the four overarching aims of sentencing. §§3553(a)(1), (2)(A)–(D);. *Pepper v. United States*, 562 U. S. 476, 487–489 (2011). *Gall v. United States*, 552 U. S. 38, 50, n. 6 (2007)

The factors listed in Title 18, United States Code, Section 3553(a) are: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need for the sentence to afford adequate deterrence to criminal conduct; (5) the need for the sentence to protect the public from further crimes of the defendant; (6) the need to provide the defendant with educational and vocational training, medical care, or other correctional treatment in the most effective manner; (7) the kinds of sentences available; (8) the need to provide restitution to victims; and (9) the need to avoid unwarranted sentence disparity among defendants involved in similar conduct who have similar records.

1 In this case, the nature and circumstances of the offense have been set out above  
2 and result in a picture of a long-running tax fraud scheme made feasible in Washington  
3 State by Mr. Yin. His history and characteristics reveal a man who has a history of minor  
4 offenses, including thefts, spanning 30 years. He committed his 2007 theft from Sears  
5 while a Sears employee so, understandably, he was fired. Generally, Mr. Yin has been in  
6 a financially precarious position and only the Profitek job with its accompanying zapper  
7 software has brought him financial stability. It is true he did not get rich using zappers  
8 but he certainly improved his economic standing by selling and servicing the fraud for  
9 several years. It is also noteworthy that the Canadian prosecutions did nothing to turn  
10 him away from participating in the illegal scheme.

11 The next three factors, (3) the need for the sentence to reflect the seriousness of  
12 the offense, to promote respect for the law, and to provide just punishment for the  
13 offense; (4) the need for the sentence to afford adequate deterrence to criminal conduct;  
14 (5) the need for the sentence to protect the public from further crimes of the defendant,  
15 may be grouped together. The defendant's Plea Agreement limits the conduct and  
16 restitution to just nine of his dozens of customers and the government firmly stands with  
17 that limitation. But the Court may note that this Profitek criminal scheme involved many  
18 more businesses – both Mr. Yin's customers locally and many other restaurants using  
19 Profitek and its zapper throughout the United States.

20 Use of the zapper to avoid taxes affects all layers of society. Our governments,  
21 local, state and federal, rely on taxes to fund even the most basic programs benefitting  
22 our residents, from public health and law enforcement to food stamps and public housing  
23 to public transportation, environmental protections and land use. Our governments can  
24 only provide needed services when taxes are paid.

25 In addition to affecting the government's ability to provide services, the failure to  
26 pay taxes by some, such as Mr. Yin's customers, unfairly increases the burden on honest,  
27 law-abiding, tax-paying others. Those citizens are harmed twice – reduced government  
28 services and an increased tax burden.

1 Prosecutions for the use of an RSS are rare, perhaps because the technology is new  
2 and proof is difficult to find. One result is that, while use of zappers may be widespread  
3 in certain, cash-rich businesses, this prosecution of a supplier is one of the first in the  
4 nation. This case may set a benchmark for how seriously this conduct is viewed. These  
5 facts, too, are appropriate for the Court to consider when assessing the seriousness of this  
6 crime, how best to promote respect for the law, and the need to deter others from  
7 engaging in this conduct.

8 There are no known similarly prosecuted defendants in the federal system so the  
9 criterion of the need to avoid unwarranted sentence disparity does not apply. Restitution  
10 is addressed previously in the pleading and the government notes the Mr. Yin is receiving  
11 a significant benefit in the Plea Agreement's structuring of the restitution obligation.

12 This conviction mandates a prison term. *USSG § 5C1.1(f)*. Mr. Yin appeared to  
13 underplay the seriousness of his offense when he advised the U.S. Probation Officer that  
14 he would request a sentence of credit for time served. He was processed by the U.S.  
15 Marshal's Office but has not served any time.

16 The last criterion is the need to provide the defendant with educational and  
17 vocational training, medical care, or other correctional treatment in the most effective  
18 manner. Mr. Yin is 66 years old with strong IT skills. He likely does not need vocational  
19 or educational training. He has medical issues typical of his age which have not  
20 prevented him from working or living a full life, including a fairly recent second  
21 marriage. The U.S. Bureau of Prisons is well equipped to handle such medical conditions  
22 and does so regularly.

### 23 24 ***Conclusion and Sentencing Recommendation***

25 Considering the above facts, the government agrees with the United States  
26 Probation Office and recommends a term at the low end of the applicable guideline  
27 range, that is, 46 months in prison, supervised release of three years, \$200 in Special  
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1 Assessments, restitution as agreed, and terms and conditions as recommended by the U.S.  
2 Probation Department.

3 DATED this 4th day of April, 2017.  
4

5 Respectfully submitted,

6 ANNETTE HAYES

7 United States Attorney

8 /s/ Susan M. Roe

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via e-mail and/or telefax.

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